


# Memo

**To:** Board of Managers  
**CC:** Shana Davis-Cook, Village Manager  
**From:** John M. Fitzgerald, Chief of Police   
**Date:** February 6, 2014  
**Re:** Request to testify in opposition to pending legislation

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## *To the Point*

I am requesting approval to testify at a hearing in Annapolis against two bills (identical language, cross-filed in both the House and the Senate) currently pending in the legislature that would do significant harm to the ability of police departments to timely and effectively discipline police officers who are guilty of misconduct.

## *The Focus of the Bills*

Currently, police officers in Maryland enjoy robust procedural protections from discipline by the Law Enforcement Officers' Bill of Rights (LEOBR at Public Safety §3-101 et. seq. of the Maryland Code).<sup>1</sup> A police officer may reject the discipline offered by the chief of police, and demand an administrative hearing to fight the allegations. The hearing board is comprised of three disinterested police officers appointed by the agency.

The identical bills at issue here (HB599/SB436) would create an exclusionary rule that would mandate that a hearing board exclude evidence against the officer if the evidence was obtained in violation of the §3-104 of the LEOBR. This pair of bills seeks to make a law that would be unnecessary and bad public policy.

### **I. Unnecessary: Redundant and effective protections are already available to accused officers**

Under the LEOBR, police officers have several protections available to them to enforce their procedural rights.

- **Petition for show cause:** In the language of §3-105, "[a] law enforcement officer who is denied a right granted by this subtitle may apply to the circuit court of the county where the law enforcement officer is regularly employed for an order that directs the law enforcement agency to show cause why the right should not be granted."

<sup>1</sup> The LEOBR requires agencies to allow an officer up to 10 days to obtain representation before answering any questions; to provide advance written notice of the allegations against the accused officer; to ask questions through only one inquisitor who must also be a law enforcement officer; to limit the duration of interrogation sessions; to allow for rest room breaks; to permit recesses in the interrogation to enable the accused officer to consult with counsel; to allow the officer's counsel to object to any question posed to the officer; and to make a complete record of the interrogation. If the officer doesn't like to discipline offered, the officer may reject the discipline and demand a hearing to have an administrative trial to challenge the charges and/or the discipline. If the officer elects a hearing, the agency must provide to the officer, at least 10 days prior to the hearing, the entire investigative file, the name of each witness against the officer, and each charge and specification against the officer, along with any exculpatory information.

- **Objection at the hearing:** Officers may object to any evidence offered by the employer, and the hearing board has the discretion to accept or reject the evidence. (§3-107)
- **Judicial review:** The circuit court has jurisdiction to hear appeals from a decision of a hearing board or the chief of police, and the officer may appeal the circuit court's decision to the Court of Special Appeals. (§3-109)

## II. Bad public policy

The exclusionary rule is a judicially-created standard that applies strictly in the criminal law to deter law enforcement officers from violating constitutional fundamental rights of suspects. When a court determines that a law enforcement officer has obtained evidence by violating the 4<sup>th</sup>, 5<sup>th</sup> or 6<sup>th</sup> amendment rights of an individual, that court may exclude that evidence from the prosecution's case.

The two bills at issue would seek to bring an exclusionary rule into an employment law setting—the LEOBR—where it has no place. Unlike the criminal setting where a person is faced with the possibility of going to prison, the employee is faced with—at worst—being fired. By creating an employment law exclusionary rule, employers—like the Village—would be forced to retain police officers knowing that they had committed serious misconduct.

Frankly, these bills go much farther than the criminal exclusionary rule in that they would kick in NOT upon a showing of a constitutional violation, but on a showing of a de minimis violation of a procedural statute that contains rules related to bathroom breaks and timelines for the filing of paperwork. A minor misstep in the investigation could plausibly result in an employee avoiding discipline entirely. Below is an example of how the law might operate if the bills passed:

§3-104 includes the following language:

*(d) Disclosures to law enforcement officer under investigation. --*

*(1) The law enforcement officer under investigation shall be informed of the name, rank, and command of:*

*(i) the law enforcement officer in charge of the investigation;*

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Assume that an officer is faced with a serious allegation of misconduct—imagine an allegation of brutality, theft or domestic violence. At the interrogation, the interrogating officer and the accused officer are the only two in the room. Their agency is a small one (10 officers), and they've worked directly together for 10 years. After turning on the audio recorder, the interrogating officer forgets to verbally identify herself by name, rank and command. The accused officer subsequently admits to the serious misconduct, and that admission is needed to successfully prosecute the case. The agency wants to fire the officer, so he requests a hearing.

At the hearing, the accused officer asserts a violation of the above subsection of §3-104 and insists that the hearing board exclude the officer's entire statement from the evidence. The hearing board MUST exclude the admission since the language of SB436 directs the exclusion using 'shall' language. The officer will go unpunished, and he would remain employed by the agency. The public deserves much better.

**Request to Testify**

On Wednesday, February 5, I joined a coalition of police officials from the Montgomery County Police Department, Montgomery County Sheriff's Office and the Takoma Park Police Department, along with representatives of the Maryland Chiefs of Police Association and the Maryland Sheriff's Association, and we met with the sponsors of the bills (Delegate Kathleen Dumais and Senator Brian Frosh). While the legislators listened, they certainly did not offer to withdraw the bills. Delegate Dumais' bill (HB599) will be heard in the Judiciary Committee at 1:00 pm on Tuesday, February 11. Senator Frosh's bill (SB436) will be heard in the Judicial Proceedings Committee at 1:00 pm on Wednesday, February 12.

In an effort to prevent these bills from passing, I request permission to testify against them in Annapolis.

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**Attachments:**

1. Language of HB599/SB436
2. Text of §3-104 of the LEOBR



# SENATE BILL 436

E2

4lr1878  
CF 4lr2460

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By: Senator Frosh

Introduced and read first time: January 24, 2014

Assigned to: Judicial Proceedings

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## A BILL ENTITLED

1 AN ACT concerning

2 **Law Enforcement Officer Bill of Rights – Hearing Board – Exclusion of**  
3 **Evidence**

4 FOR the purpose of requiring a certain hearing board to exclude certain evidence  
5 obtained during an investigation or interrogation by a law enforcement agency  
6 of a law enforcement officer under certain circumstances; and generally relating  
7 to the Law Enforcement Officer Bill of Rights.

8 BY repealing and reenacting, without amendments,  
9 Article – Public Safety  
10 Section 3–107(a)  
11 Annotated Code of Maryland  
12 (2011 Replacement Volume and 2013 Supplement)

13 BY repealing and reenacting, with amendments,  
14 Article – Public Safety  
15 Section 3–107(f)  
16 Annotated Code of Maryland  
17 (2011 Replacement Volume and 2013 Supplement)

18 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF  
19 MARYLAND, That the Laws of Maryland read as follows:

20 **Article – Public Safety**

21 3–107.

22 (a) (1) Except as provided in paragraph (2) of this subsection and § 3–111  
23 of this subtitle, if the investigation or interrogation of a law enforcement officer results  
24 in a recommendation of demotion, dismissal, transfer, loss of pay, reassignment, or  
25 similar action that is considered punitive, the law enforcement officer is entitled to a

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EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 hearing on the issues by a hearing board before the law enforcement agency takes that  
2 action.

3 (2) A law enforcement officer who has been convicted of a felony is not  
4 entitled to a hearing under this section.

5 (f) (1) Evidence with probative value that is commonly accepted by  
6 reasonable and prudent individuals in the conduct of their affairs is admissible and  
7 shall be given probative effect.

8 (2) The hearing board shall give effect to the rules of privilege  
9 recognized by law and shall exclude:

10 (I) incompetent, irrelevant, immaterial, and unduly repetitious  
11 evidence; AND

12 (II) EVIDENCE OBTAINED IN VIOLATION OF § 3-104 OF THIS  
13 SUBTITLE.

14 (3) Each record or document that a party desires to use shall be  
15 offered and made a part of the record.

16 (4) Documentary evidence may be received in the form of copies or  
17 excerpts, or by incorporation by reference.

18 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect  
19 October 1, 2014.

*Md. PUBLIC SAFETY Code Ann. § 3-104*

Annotated Code of Maryland  
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\*\*\* Statutes current through the 2013 General Assembly Regular Session \*\*\*

PUBLIC SAFETY  
TITLE 3. LAW ENFORCEMENT  
SUBTITLE 1. **LAW ENFORCEMENT OFFICERS' BILL OF RIGHTS**

Md. PUBLIC SAFETY Code Ann. **§ 3-104** (2013)

**§ 3-104. Investigation or interrogation of law enforcement officer**

(a) In general. -- The investigation or interrogation by a law enforcement agency of a law enforcement officer for a reason that may lead to disciplinary action, demotion, or dismissal shall be conducted in accordance with this section.

(b) Interrogating or investigating officer. -- For purposes of this section, the investigating officer or interrogating officer shall be:

(1) a sworn law enforcement officer; or

(2) if requested by the Governor, the Attorney General or Attorney General's designee.

(c) Complaint that alleges brutality. --

(1) A complaint against a law enforcement officer that alleges brutality in the execution of the law enforcement officer's duties may not be investigated unless the complaint is sworn to, before an official authorized to administer oaths, by:

(i) the aggrieved individual;

(ii) a member of the aggrieved individual's immediate family;

(iii) an individual with firsthand knowledge obtained because the individual was present at and observed the alleged incident; or

(iv) the parent or guardian of the minor child; if the alleged incident involves a minor child.

(2) Unless a complaint is filed within 90 days after the alleged brutality, an investigation that may lead to disciplinary action under this subtitle for brutality may not be initiated and an action may not be taken.

(d) Disclosures to law enforcement officer under investigation. --

(1) The law enforcement officer under investigation shall be informed of the name, rank, and command of:

- (i) the law enforcement officer in charge of the investigation;
- (ii) the interrogating officer; and
- (iii) each individual present during an interrogation.

(2) Before an interrogation, the law enforcement officer under investigation shall be informed in writing of the nature of the investigation.

(e) Disclosures to law enforcement officer under arrest. -- If the law enforcement officer under interrogation is under arrest, or is likely to be placed under arrest as a result of the interrogation, the law enforcement officer shall be informed completely of all of the law enforcement officer's rights before the interrogation begins.

(f) Time of interrogation. -- Unless the seriousness of the investigation is of a degree that an immediate interrogation is required, the interrogation shall be conducted at a reasonable hour, preferably when the law enforcement officer is on duty.

(g) Place of interrogation. --

(1) The interrogation shall take place:

(i) at the office of the command of the investigating officer or at the office of the local precinct or police unit in which the incident allegedly occurred, as designated by the investigating officer; or

(ii) at another reasonable and appropriate place.

(2) The law enforcement officer under investigation may waive the right described in paragraph (1)(i) of this subsection.

(h) Conduct of interrogation. --

(1) All questions directed to the law enforcement officer under interrogation shall be asked by and through one interrogating officer during any one session of interrogation consistent with paragraph (2) of this subsection.

(2) Each session of interrogation shall:

(i) be for a reasonable period; and

(ii) allow for personal necessities and rest periods as reasonably necessary.

(i) Threat of transfer, dismissal, or disciplinary action prohibited. -- The law enforcement officer under interrogation may not be threatened with transfer, dismissal, or disciplinary action.

(j) Right to counsel. --

(1) (i) On request, the law enforcement officer under interrogation has the right to be represented by counsel or another responsible representative of the law enforcement officer's choice who shall be present and available for consultation at all times during the interrogation.



(ii) The law enforcement officer may waive the right described in subparagraph (i) of this paragraph.

(2) (i) The interrogation shall be suspended for a period not exceeding 10 days until representation is obtained.

(ii) Within that 10-day period, the chief for good cause shown may extend the period for obtaining representation.

(3) During the interrogation, the law enforcement officer's counsel or representative may:

(i) request a recess at any time to consult with the law enforcement officer;

(ii) object to any question posed; and

(iii) state on the record outside the presence of the law enforcement officer the reason for the objection.

(k) Record of interrogation. --

(1) A complete record shall be kept of the entire interrogation, including all recess periods, of the law enforcement officer.

(2) The record may be written, taped, or transcribed.

(3) On completion of the investigation, and on request of the law enforcement officer under investigation or the law enforcement officer's counsel or representative, a copy of the record of the interrogation shall be made available at least 10 days before a hearing.

(l) Tests and examinations -- In general. --

(1) The law enforcement agency may order the law enforcement officer under investigation to submit to blood alcohol tests, blood, breath, or urine tests for controlled dangerous substances, polygraph examinations, or interrogations that specifically relate to the subject matter of the investigation.

(2) If the law enforcement agency orders the law enforcement officer to submit to a test, examination, or interrogation described in paragraph (1) of this subsection and the law enforcement officer refuses to do so, the law enforcement agency may commence an action that may lead to a punitive measure as a result of the refusal.

(3) If the law enforcement agency orders the law enforcement officer to submit to a test, examination, or interrogation described in paragraph (1) of this subsection, the results of the test, examination, or interrogation are not admissible or discoverable in a criminal proceeding against the law enforcement officer.

(m) Tests and examinations -- Polygraph examinations. --

(1) If the law enforcement agency orders the law enforcement officer to submit to a polygraph examination, the results of the polygraph examination may not be used as evidence in an administrative hearing unless the law enforcement agency and the law enforcement officer agree to the admission of the results.

(2) The law enforcement officer's counsel or representative need not be present during the actual administration of a polygraph examination by a certified polygraph examiner if:

(i) the questions to be asked are reviewed with the law enforcement officer or the counsel or representative before the administration of the examination;

(ii) the counsel or representative is allowed to observe the administration of the examination; and

(iii) a copy of the final report of the examination by the certified polygraph examiner is made available to the law enforcement officer or the counsel or representative within a reasonable time, not exceeding 10 days, after completion of the examination.

(n) Information provided on completion of investigation. --

(1) On completion of an investigation and at least 10 days before a hearing, the law enforcement officer under investigation shall be:

(i) notified of the name of each witness and of each charge and specification against the law enforcement officer; and

(ii) provided with a copy of the investigatory file and any exculpatory information, if the law enforcement officer and the law enforcement officer's representative agree to:

1. execute a confidentiality agreement with the law enforcement agency not to disclose any material contained in the investigatory file and exculpatory information for any purpose other than to defend the law enforcement officer; and

2. pay a reasonable charge for the cost of reproducing the material.

(2) The law enforcement agency may exclude from the exculpatory information provided to a law enforcement officer under this subsection:

(i) the identity of confidential sources;

(ii) nonexculpatory information; and

(iii) recommendations as to charges, disposition, or punishment.

(o) Adverse material. --

(1) The law enforcement agency may not insert adverse material into a file of the law enforcement officer, except the file of the internal investigation or the intelligence division, unless the law enforcement officer has an opportunity to review, sign, receive a copy of, and comment in writing on the adverse material.

(2) The law enforcement officer may waive the right described in paragraph (1) of this subsection.

**HISTORY:** An. Code 1957, art. 27, §§ 727(h), 728(b)(1)-(10), (12)(i), (14); 2003, ch. 5, § 2.